Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1635

STATE OF SOUTH DAKOTA, *Petitioner*

VS.

CECIL D. ANDRUS, *et al.*, *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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To the Honorable, the Chief Justice and Associate Justices of the United States:

State of South Dakota, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on February 12, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals is

unreported at this time and is printed in the Appendix hereto beginning on page 9.

The opinion of the United States District Court for the District of South Dakota, which is officially reported at 462 F.Supp. 905 (1978), is set forth in the Appendix, beginning on page 19. The final decision of the United States Department of Interior, through the Interior Board of Land Appeals, which is reported at 30 IBLA 388 (1977), is printed in the Appendix beginning on page 31.

JURISDICTION

The decision of the United States Court of Appeals was entered *on February 12, 1980.* The mandate of the Court of Appeals was issued on March 10, 1980. A petition for writ of certiorari is due on May 12, 1980. This court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Is the United States Department of Interior required by 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(C) to file an Environmental Impact Statement prior to the issuance of a mineral patent under the General Mining Act of 1872, 30 U.S.C. § 21 et seq?

FEDERAL LAWS INVOLVED

This case involves an interpretation of Section 4332 of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., and Sections 22, 26 and 29 of the General Mining Act of 1872, 30 U.S.C. 21 et seq. These statutes are set forth in the Appendix beginning on page 1.

STATEMENT OF THE CASE

Pittsburgh Pacific Company filed an application

under the General Mining Act of 1872, 30 U.S.C. § 21 et seq., for a mineral patent to twelve contiguous twenty-acre mining claims located within the Black Hills National Forest in South Dakota. Appendix, page 10. (hereinafter, App. ____). These applications were based upon an alleged discovery of taconite or iron ore within the mining claims. The Bureau of Land Management, at the request of the United States Forest Service, contested these applications for mineral patents. App. 10.

The Bureau of Land Management in the administrative hearing contended that the applicant had failed to prove the discovery of valuable mineral deposits in the claims, and argued that, therefore, the mineral patents should not be issued to Pittsburgh Pacific. The administrative law judge denied the contest to the patents and found that the company was entitled to a mineral patent for the twelve claims. App. 10-11. The Bureau appealed the decision of the administrative law judge to the Interior Board of Land Appeals. The State of South Dakota and the American Mining Congress were permitted to appear as amicus curiae. App. 11 and 32. Subsequently the State was allowed as an intervening party in the patent contest. App. 46.

Before the Board of Land Appeals, the State contended *inter alia*, that an Environmental Impact Statement (EIS) must be prepared at the earliest possible moment on the proposed mineral patents as required by NEPA. App. 48. The State argued that the issuance of a mineral patent is a major federal action significantly affecting the human environment under 42 U.S.C. 4332. App. 47.

The argument continued that the preparation of such an EIS is not impossible under the General Mining Act of 1872, and that an EIS is required prior to the taking of a nondiscretionary action such as granting a

mineral patent. The State asserted that an EIS would be helpful in determining the environmental costs required to be met by an operation to mine the discovered minerals, and therefore would be of assistance in determining whether the ore was truly marketable or valuable as required for a discovery under the General Mining Act. App. 48. The Board of Land Appeals decided that an EIS was not required, but set aside the decision of the administrative law judge and remanded the patent applications back for further hearings on environmental costs and other issues. App. 54 and 57.

Subsequent to the Board's decision the State commenced this action in the United States District Court for South Dakota seeking to compel the preparation of an EIS on the proposed mineral patent's issuance prior to any further proceedings. App. 10. The State asserted that the District Court had jurisdiction under 42 U.S.C. 4321 et seq. (NEPA), 5 U.S.C. 701 through 706, 28 U.S.C. 1331(a) and 28 U.S.C. 1361.

Pittsburgh Pacific Company during the patent proceedings proposed to mine 96 million tons of iron ore from the 240 acres of claims if a patent giving the company fee title to the land is granted. App. 10, and App. 33-34. The company perceives obtaining the patent as an economic necessity for commencement of the proposed mining operations on the claims. App. 34.

Pittsburgh's plan of operations includes the annual removal of 7,200,000 long tons of ore from the mine, the crushing of the best 4,900,000 long tons, the preliminary separation and reduction roasting of the best 2,300,000 long tons until all the ore is magnetized, and, the final step in the milling process, producing 1,000,000 long tons of iron ore pellets. These finished pellets would be loaded and shipped from the mill in 10,000 railroad cars each year. App. 34.

Pittsburgh's proposed plan for development of the iron ore in the claims into a profitable operation would require approximately 600 to 900 acres of land outside the mining claims upon which to construct its plants, tailings pond and water storage reservoir. App. 38 and 46. Such land would have to be obtained from nearby private sources or from the United States Forest Service, which owns land surrounding the mining claims. App. 38-39.

The availability of Forest Service or private land needed outside the mining claims by Pittsburgh Pacific will be an issue upon rehearing before the administrative law judge. App. 39-40. In sum, Pittsburgh Pacific Company's proposed project could remove anywhere from 240 to 1,140 acres from the Black Hills National Forest.

Pittsburgh Pacific Company will have significant water needs in its milling process. These water demands include water of 1,000 gallons per minute or 1,300 acre-feet of water per year. A potential source of such water is Box Elder Creek. App. 37. The question of the availability of sufficient water will also be an issue on remand. App. 38.

Both the federal defendants and Pittsburgh Pacific Company moved to dismiss the State's action in United States District Court contending that the issuance of a mineral patent is not a major federal action under NEPA which requires an EIS. Judge Bogue granted the motions. *South Dakota v. Andrus*, 462 F.Supp. 905 (1978).

The Court of Appeals for the Eighth Circuit affirmed the District Court's order. The Court of Appeals noted that ministerial acts have generally been held outside the ambit of NEPA's EIS requirements. App. 14. The court cited several other courts of appeals' decisions as examples, but observed that the United

States Supreme Court "has not yet resolved the issue of whether nondiscretionary actions fall within the scope of NEPA's EIS requirement." App. 15, footnote 4. The Court of Appeals cited *Flint Ridge Development Company v. Scenic Rivers Association*, 426 U.S. 776, 96 S.Ct. 2430, 49 L.Ed.2d 205 (1976) in which the Supreme Court held the performance of a nondiscretionary act under a statute to be in fundamental conflict with the EIS requirements of NEPA. Because of that conflict, the Supreme Court held NEPA must give way; however, it explicitly left unanswered the more general question of whether the EIS requirements of NEPA applied to nondiscretionary acts.

The Court of Appeals believed that "it is at least doubtful that the Secretary's nondiscretionary approval of a mineral patent constitutes an 'action' under § 102(2)(C)." App. 15. However, the Court of Appeals eschewed resolving this issue and instead based its decision upon the finding that granting a mineral patent is not a "major" federal action. App. 17. The Court of Appeals characterized as questionable the State's contention that the preparation of an EIS is compatible with the requirements of granting a mineral patent. However, it did not address this argument in light of its conclusion that the granting of a patent is not a major federal action. App. 17, footnote 5.

The State of South Dakota now files its petition for certiorari.

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law which have not been previously settled by the Supreme Court. The primary issue is whether an agency is exempted from the EIS requirements of NEPA when performing a nondiscretionary act pursuant to an organic statute of the agency. The Court of Appeals

had doubts as to whether nondiscretionary acts were actions requiring an EIS under 42 U.S.C. 4332. However, the court skirted the issue by deciding that the issuance of a mineral patent is not a "major" federal action under NEPA.

This means of avoiding the ultimate issue is incongruous with the Eighth Circuit Court of Appeals' rule that holds any federal action which significantly affects the quality of the human environment is presumed to be "major." *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1321-1322 (CA8 1974). The Court of Appeals in that case rejected bifurcating the statutory language of 42 U.S.C. 4332(C). However, the Court of Appeals in this action has apparently rejected its holding in *MPIRG v. Butz, supra* in order to avoid ruling on questions of NEPA's applicability to nondiscretionary actions.

The State believes that the granting of the mineral patent in question is clearly a "major federal action" under either a bifurcated or unitary analysis of the statute and that a decision on the issue of NEPA's applicability to nondiscretionary actions is essential to a correct determination of this case.

The Court of Appeals, in deciding that the issuance of a patent was not major, relied upon the fact that an owner of a mining claim has a legal right to mine his claims under the General Mining Act of 1872 without ever obtaining a mineral patent. The Court of Appeals acknowledged that the granting of a federal permit or license which will cause actions with significant environmental effects requires an EIS. However, the Court of Appeals saw those type of actions as "major" because they enabled a private party to act so as to affect the environment.

> [I]n the instant case, the granting of a mineral patent does not enable the private party, Pittsburgh, to do

anything. Unlike the cases where a lease, permit or license is required before particular projects can begin, the issuance of a mineral patent is not a precondition which enables a party to begin mining operations. 30 U.S.C. 26. App. 4.

This conclusion does not harmonize with the realities of the present situation. The mineral patent at issue in this case is a necessity for the fruition of Pittsburgh Pacific Company's proposed plan of operation. Without the patent, Pittsburgh Pacific will be unable to obtain financing to undertake the proposed mining and milling venture.

Although the Court of Appeals' conclusion that a mineral patent is not a *legal* necessity for mining a claim may be correct, in fact the granting of the mineral patent will enable Pittsburgh to mine. An action by the federal government is proposed which is a necessary step towards starting a proposed project which will have significant effects upon the environment when undertaken. Clearly, the action of granting a mineral patent is a linchpin for the project's future.

The proposed action of granting the mineral patent is also major in the sense of its own magnitude. The application has already received lengthy hearings on numerous issues before the administrative law judge and future hearings will be held on labor and environmental costs and water and land availability, inter alia. App. 38, 39, 45, 47 and 56. Such federal actions have and will be much more than cursory. The granting of a mineral patent after such activities should be characterized as a "major" federal action under NEPA.

The preparation of an EIS prior to decisions on mineral patent applications could be beneficial to both the government and the public. The Bureau of Land Management and other federal agencies would gain information from an EIS that would be relevant to deter-

mining whether to oppose the granting of a mineral patent. An EIS could show certain costs would have to be assumed by the operation in order to minimize adverse environmental effects and to comply with federal, state and local environmental laws. The costs of the proposed operation's compliance with such environmental laws is a legitimate factor in determining whether a patent should issue. Such costs could well be the decisive factor in some instances in determining whether a mineral deposit is of such a nature that a person or ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. *Costle v. Womble*, 19 L.D. 455, 456 (1977). One aspect of this prudent man test is a showing of marketability which includes a consideration of whether the ore can be marketed at a profit. *United States v. Coleman*, 390 U.S. 599 (1968). A factor in determining profit is costs of production, including costs of complying with environmental laws. *United States v. Kosanke San Corporation*, 12 IBLA 282, 298-299 (1973), *United States v. Pittsburgh Pacific Company, supra*, 30 IBLA at 405.

Should a patent be granted, the EIS developed during the mineral patent application process would also have value to state and local agencies in reviewing the potential adverse effects of the proposed mining project. An EIS could assist them in deciding whether state or local permits should be issued. NEPA envisioned cooperation and a sharing of information between federal, state and local government agencies.

> The Congress, recognizing the profound impact of man's activities on the interrelations of all components of the environment, . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare

and development of man, declares that it is the continuing policy of the Federal Government, in *cooperation with* state and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. 42 U.S.C. 4331(a), (emphasis added.)

The preparation of an EIS prior to a patent's issuance would promote this call for cooperation with state and local government. This is particularly important where the proposed federal action could place an environmental problem-child on the state and local governments doorstep. The federal government's preparation of an EIS could be of much assistance to the local decisionmakers.

An EIS on proposed patents would also be useful as a forum for discussion by the public and its elected representatives. Although it is a truism, a well informed public and its participation are cornerstones of our democracy. Discussion generated by such EIS's could be impetus for Congress to amend certain provisions of the General Mining Act or at least to withdraw certain lands from its discovery provisions.

The preparation of an EIS on a proposed mineral patent application would not be in conflict with the Department of Interior responsibilities in reviewing patent applications under the General Mining Act of 1872. Interior is under no time restraints like the agency in *Flint Ridge Development Co. v. Scenic Rivers Association*, 426 U.S. 776, 96 S.Ct. 2430 (1976). In that instance, the statements of record required to be filed

with the Department of Housing and Urban Development became effective within 30 days of submittal to the agency unless disapproved because they were incomplete or inaccurate. Obviously, it would have been impossible to prepare an EIS within that time frame, and the only alternative would have been to delay the time in which the statements of record became effective past the statutory deadline in order to prepare an EIS on the proposed action. *Flint Ridge Development*, Id. 96 S.Ct. at 2437-2438. The preparation of an EIS in the present case would do no such violence to Interior's responsibilities under its Organic Act.

Preparation of an EIS on a mineral patent would not trivalize the purposes of NEPA. *Andrus v. Sierra Club*, ____ U.S. ____ 99 S.Ct. 2335, 2341 (1979). An EIS could be of assistance to the patent process itself as well as to other federal, state and local agencies. An EIS may well be instrumental in focusing attention on the environmental costs of mining a mineral claim proposed for patenting. Such scrutiny could well prevent the loss of public land and the placing of a problem child on the state and local government's doorsteps.

The question of whether an EIS must be prepared as part of the mineral patent process is an important federal question affecting large tracts of land in the western United States. For example, the federal government owns 86.5% of the land in Nevada. *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 3013, Footnote 3 (1978). Unless these federal lands are withdrawn from the discovery provisions of the General Mining Act, they are subject to private capture upon the showing of a discovery of valuable minerals.

CONCLUSION

The Supreme Court has had the question of whether a "nondiscretionary" action is subject to the EIS requirements of NEPA presented to it only once before. The Court, reversing the case on other grounds, found it unnecessary to answer that question in *Flint Ridge Development Co. v. Scenic Rivers Association, supra.*

The question is once again posed here to the Supreme Court: Should the Secretary of Interior prepare an EIS before deciding to issue a mineral patent? Is an EIS required in an administrative process which requires proof that there is a reasonable prospect of success in developing the claims into a paying mine before the Secretary has a nondiscretionary duty to issue a patent? Is there a duty to prepare an EIS when the Secretary of Interior must determine the environmental costs of a proposed mining operation as a condition precedent to the imposition of his nondiscretionary duty to grant mineral patents.

The issue presented here could have a significant impact on disposal of federal lands. This Court's decision to grant this writ of certiorari will have a significant

impact upon the state and local governments affected by the granting of mineral patents such as those in this case. The resolution of the issues raised will be an important decision on the degree of environmental consideration and debate allowed in the mineral patent granting process. Such debate could well decide the quality of the human environment on large tracts of land in this country. For this reason the court should grant the State's Petition for Writ of Certiorari.

Dated this 28th day of March, 1980.

Respectfully submitted,

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Appendix 1

42 U.S.C. § 4332.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes

guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international

cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

30 U.S.C. § 22 Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they

comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

30 U.S.C. § 29. Patents; procurement procedure; filing: application under oath, plat and field notes, notices, and affidavits; posting plat and notice on claim; publication and posting notice in office; certificate; adverse claims; payment per acre; objections; non-resident claimant's agent for execution of application and affidavits

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter and sec-

tions 71 to 76 of this title, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter and sections 71 to 76 of this title, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Chief Cadastral Engineer, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The manager of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the Manager a certificate of the United States Chief Cadastral Engineer that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the

claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the Manager of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter and sections 71 to 76 of this title. Where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

Appendix 2

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 79-1178

State of South Dakota,
Appellant,

v.

Cecil D. Andrus, as Secretary of United States Department of Interior; Joseph W. Goss, Anne Poindexter Lewis, and Martin Ritvo, as Administrative Judges of the United States Department of Interior, Interior Board of Land Appeals; George L. Turcott, as Acting Director of the United States Department of Interior, Bureau of Land Management; the United States Department of Interior; and Pittsburgh Pacific Company,
Appellees.

Appeal from the United States District Court for the District of South Dakota.

Submitted: September 13, 1979
Filed: February 12, 1980

Before BRIGHT and HENLEY, Circuit Judges, and REGAN, Senior District Judge.*

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* The Honorable John K. Regan, United States Senior District Judge, Eastern District of Missouri, sitting by designation.

HENLEY, Circuit Judge.

This is an appeal from a judgment entered The Honorable Andrew W. Bogue of the United States District Court for the District of South Dakota dismissing the State of South Dakota's suit in which the State sought declaratory and injunctive relief to compel the United States Department of Interior to prepare an Environmental Impact Statement (EIS) prior to its issuance of a mineral patent to the Pittsburgh Pacific Company (Pittsburgh). On appeal the State contends that the district court erred and asks us to reverse and remand this case for a trial on the merits. After careful review of the district court's judgment, we affirm.

I

Pittsburgh filed an application under the General Mining Act of 1872, 30 U.S.C. § 21 *et seq.*, for a mineral patent to twelve contiguous twenty acre mining claims located within the Black Hills National Forest in Lawrence County, South Dakota. Pittsburgh claimed discovery of some 160 million tons of relatively low grade iron ore and sought a mineral patent covering the discovery lands. Pittsburgh proposed to mine 96 million tons of the ore through open pit mining at an annual rate of approximately seven million long tons a year. The general plan of operation also included processing the best of this ore into hard pellets as well as loading these pellets into railroad cars for shipping.

In 1971, however, Pittsburgh's application for a mineral patent was contested, at the request of the United States Forest Service, by the Bureau of Land Management. The Bureau contended that Pittsburgh had not discovered a valuable mineral deposit under the 1872 Mining Act. The Administrative Law Judge

nonetheless dismissed the complaint and approved the mineral patent.

The Bureau then appealed the decision to the Interior Board of Land Appeals alleging that the Administrative Law Judge erred in his geological and economic analysis in determining whether Pittsburgh had discovered a "valuable" deposit. In addition, the State of South Dakota petitioned to intervene and was permitted to file an amicus brief in which the State argued, *inter alia*, that the Administrative Law Judge had not given proper consideration to the cost of compliance with environmental quality statutes. Recognizing that Pittsburgh's proposed mining project would take 240 to 1,140 acres from a national forest and discard approximately 2.3 million tons of waste annually, the State argued that the Secretary must prepare an EIS before a mineral patent could issue. The Board determined that an EIS need not be prepared prior to the issuance of a mineral patent for these claims. *United States v. Pittsburgh*, 30 IBLA 388 (1977). The Board, however, set aside the decision of the Administrative Law Judge on other grounds and remanded the case for further hearings with respect to the expense of complying with environmental laws as well as any other issue which might arise.

Subsequently, the State filed an original action in federal district court seeking to compel preparation of an EIS prior to the issuance of a mineral patent naming as defendants the United States Department of the Interior and Pittsburgh. Both defendants moved to dismiss contending the issuance of a mineral patent is not a major federal action which requires an EIS, and Judge Bogue granted the motion. *South Dakota v. Andrus*, 462 F.Supp. 905 (D. S.D. 1978).

II

The issue on this appeal is whether the United States Department of the Interior is required by § 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(C) to file an EIS prior to the issuance of a mineral patent.[1]

Our starting point is, of course, the statutory language. Section 102(2)(C) provides in part that an EIS is required for "major Federal actions which signifi-

[1] Relying on the fact that the Interior Board of Land Appeals remanded the case to the Administrative Law Judge and has not finally decided whether a patent should issue, the American Mining congress in an amicus brief argues that this court should not entertain these proceedings until the parties have exhausted their administrative remedies. We do not agree. The doctrine of exhaustion of administrative remedies is not a strict jurisdictional requirement, but rather a flexible concept which must be tailored to the circumstances of the particular case. *McKart v. United States*, 395 U.S. 185 (1969); *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860 (5th Cir. 1975). In the present case, the Department of the Interior has for all practical purposes decided the issue sought to be raised by the litigation, namely, whether an EIS need be filed prior to the issuance of a mineral patent. The remaining question before the agency is only tangentially relevant to the dispositive question before us. *Louisiana Power & Light Co. v. F.P.C.*, 557 F.2d 1122, 1125 (5th Cir. 1977). Where, as here, the drawbacks of requiring exhaustion outweigh the advantages, courts have not hesitated in NEPA cases to make exceptions to the exhaustion doctrine. *See, e.g., Jette v. Bergland*, 579 F.2d 59, 62 (10th Cir. 1978); *Arkansas Power & Light Co. v. F.P.C.*, 517 F.2d 1223, 1236-37 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

cantly affect the quality of the human environment."[2] Applied to this case, § 102(2)(C) mandates the filing of an EIS if (1) the issuance of a mineral patent is an "action" within the meaning of the provision, and (2) the alleged federal action is "major" in the sense that it significantly affects the quality of the human environment.

A

We turn first to the question whether the granting of a mineral patent constitutes an "action" within the meaning of NEPA. As the district court noted, it is well established that the issuance of a mineral patent is a ministerial act. Both the Supreme Court, in a series of decisions in the early part of this century, *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 318-19 (1929); *Cameron v. United States*, 252 U.S. 450, 454

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[2] Section 102(2)(C) specifically provides in part that all agencies of the federal government shall:

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(1920); *Roberts v. United States*, 176 U.S. 221, 231 (1900), and, more recently, the Interior Board of Land Appeals, *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 290-91 (1973); *United States v. O'Leary*, 63 ID 341 (1956),[3] have so concluded. **Ministerial acts**, however, have **generally been held outside the ambit of NEPA's EIS requirement**. Reasoning that the primary purpose of the impact statement is to **aid agency decisionmaking**, courts have indicated that nondiscretionary acts should be exempt from the requirement. *N.A.A.C.P. v. Medical Center, Inc.*, 584 F.2d 619, 634 (2d Cir. 1978); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972); *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*, 470 F.2d 289, 294 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); *Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C.*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

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[3] As the district court observed, *South Dakota v. Andrus*, *supra*, 462 F.Supp. at 907, the Board, in *United States v. Kosanke Sand Corp.*, *supra*, concluded:

> Upon satisfaction of the requirements of the statute, the holder of a valid mining claim has an absolute right to a patent from the United States conveying fee title to the land within the claim, and the actions taken by the Secretary of the Interior in processing an application for patent by such claimant are not discretionary; issuance of a patent can be compelled by court order. [Citations omitted.] The patent may contain no conditions not authorized by law. [Citation omitted.] The claimant need not, however, apply for patent to preserve his property right in the claim, but may if he chooses continue to extract and freely dispose of the locatable minerals until the claim is exhausted, without ever having acquired full legal title to the land. [Citations omitted.] The patent, if issued, conveys fee simple title to the land within the claim, but does noting to enlarge or diminish the claimant's right to its locatable mineral resources.

In light of these decisions, it is **at least doubtful** that the Secretary's **nondiscretionary approval of a mineral patent** constitutes **an "action"** under § 102(2)(C).[4]

B

But **even if** a ministerial act may **in some circumstances** fall within § 102(2)(C), we still **cannot say that the issuance** of a mineral **patent is a "major" federal action** under the statute. This conclusion does not stem from the court's belief that an agency itself must propose to build a facility and directly affect the environment in order to constitute a "major" federal action within the meaning of NEPA. We fully recognize that NEPA's impact statement procedure has been held to apply where the federal government grants a lease, *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975); *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972); issues or license, *Greene County Planning Board v. F.P.C.*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); or approves or funds state highway projects, *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849 (8th Cir. 1973); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971).

In each of these cases, however, an agency took a "major" federal action because it enabled **a private party** to act so as to significantly affect the environment. Such enablements have consistently been held subject to NEPA. *See National Forest Preservation v.*

[4] The Supreme Court has not yet resolved the issue of whether nondiscretionary actions fall within the scope of NEPA's EIS requirement. Although the Tenth Circuit in its 1975 decision, *Scenic Rivers Ass'n v. Lynn*, 520 F.2d 240, 245 (10th Cir. 1975), *rev'd on other grounds sub nom. Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976), held that ministerial acts constitute "major federal actions" under NEPA, the Supreme Court in reversing did not discuss this issue.

Butz, 485 F.2d 408, 412 (9th Cir. 1973), and authorities cited therein. But in the instant case, the granting of a **mineral patent does not enable the private party**, Pittsburgh, to do anything. Unlike the cases where a lease, permit or license is required before the particular project can begin, the issuance of a mineral patent is **not a precondition** which enables a party to begin mining operations. 30 U.S.C. 26.

As the Supreme Court noted in *Union Oil Co. v. Smith*, 249 U.S. 337 (1919), if a qualified locator of a mining claim locates, marks and records his claim to unappropriated public lands in accordance with federal and local law, he has an "exclusive right of possession to the extent of his claim as located, with the right to extract minerals, even to exhaustion, without paying any royalty to the United States as owner, and without ever applying for a patent . . . ." *Id.* at 348-49. Furthermore, in *Wilbur v. United States ex rel. Krushnic, supra*, 280 U.S. at 316-17, the Court revealed:

> The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession . . . so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent.

In recent years the mining laws governing the locating of mineral claims have remained unchanged, 30 U.S.C. §§ 22, 26, and modern decisions have continued to allow locators of mining claims to extract minerals without a patent provided they have met the

statutory prerequisites. *See, e.g., Lombardo Turquoise Milling & Mining Co. v. Hemanes*, 430 F. Supp. 429 (D. Nev. 1977).

In light of the fact that a mineral patent **in actuality is not a federal determination which enables the party to mine**, we conclude in present context that the granting of such a patent is not a "major" federal action within the meaning of § 102(2)(C).[5]

III

In reaching this conclusion, we do not decide the question whether an EIS should be required at some point after the mineral patent has issued. While a federal agency need not prepare an EIS during the "germination process of a potential proposal," *Kleppe v. Sierra Club*, 427 U.S. 390, 401 n.12, 406 (1976), this is not to say that at some later date an EIS will not be required. We note that Pittsburgh's proposed mining project is substantial and that if Pittsburgh decides to build the mine many actions may be necessary. For example, the claims at issue will presumedly need permits from the Forest Service for roads, water pipelines

[5] Assuming that the issuance of a mineral patent is a major federal action significantly affecting the quality of the human environment, appellant argues that requiring the Secretary to prepare an EIS is not incompatible with the Secretary's duties under the General Mining Act of 1872. *Chelsea Neighborhood Ass'n v. United States Postal Service*, 516 F.2d 378 (2d Cir. 1975); *Louisiana v. F.P.C.*, 503 F.2d 844 (5th Cir. 1974); *Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Natural Resources Defense Council, Inc. v. Berklund*, 458 F.Supp. 925 (D. D.C. 1978), *aff'd:* _____ F.2d _____, No. 78, 1842 (D.C. Cir. Nov. 9, 1979). Although **we believe** that appellant's **contention is questionable**, *cf. Natural Resources Defense Council, Inc. v. Berklund*, _____ F.2d _____, No. 78-1842 (D.C. Cir. Nov. 9, 1979), in light of our conclusion that the issuance of a mineral patent is not a major federal action, we find it unnecessary to address this argument.

and railroad rights of way. 43 U.S.C. § 1761(a)(1) and (a)(6). Moreover, the company may possibly seek to make land exchanges with the Forest Service. We leave to another day the question whether an EIS would be required in connection with any one or more such actions.

It is sufficient for the moment to conclude that in the present case an EIS need not be filed prior to the issuance of a mineral patent. Accordingly, the judgment of the district court is affirmed.

A true copy.
Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Appendix 3

STATE OF SOUTH DAKOTA
v.
Cecil D. ANDRUS, Secretary of U.S. Department of Interior, et al.

No. CIV 77-5058.

United States District Court,
D. South Dakota.

Dec. 26, 1978.

MEMORANDUM OPINION

BOGUE, District Judge.

Plaintiff seeks both injunctive and declaratory relief thereby requesting this Court to determine that an environmental impact statement (hereinafter an EIS) must be prepared before defendant Pittsburgh Pacific Company can be granted the mineral patent to twelve twenty-acre mining claims located within the Black Hills National Forest, Lawrence County, South Dakota. Pittsburgh Pacific Company's application for a patent for these claims was contested by the Bureau of Land Management at the request of the United States Forest Service. After the trial of this contest, the administrative law judge entered a decision denying the contest and affirmatively finding Pittsburgh Pacific Company to be entitled to a mineral patent for the twelve mineral claims. The Bureau of Land Management, at the request of the Forest Service, appealed that decision to the United States Department of Interior, Interior Board of Land Appeals. At that stage

the State of South Dakota filed an *amicus curiae* brief arguing *inter alia*, that the Secretary must prepare an EIS before a mineral patent could be issued. The Board determined that no EIS need be prepared prior to the issuance of a mineral patent for these claims. *United States v. Pittsburgh Pacific Company*, 30 IBLA 388 (1977). The Board, however, did set aside the decision of the administrative law judge for different reasons and remanded the case for further hearings in the matter.

Subsequent to these proceedings, the State of South Dakota commenced this suit seeking to compel the preparation of an EIS for the claims in question prior to the issuance of a mineral patent. Both the federal defendants and Pittsburgh Pacific Company have moved to dismiss plaintiff's complaint. The defendants contend that the Secretary of the Interior has no discretion in granting a mineral patent. Consequently, they argue, an applicant is entitled to a mineral patent after having demonstrated compliance with the specific statutory prerequisites. As the Secretary has no discretion beyond assuring compliance with these prerequisites, defendants contend that any EIS would be of minimal value. Furthermore, defendants contend that the granting of a mineral patent is not a "major federal action" which will significantly affect the quality of the human environment within the meaning of 42 U.S.C. § 4332(C).

It has been accepted that the initial determination concerning the applicability of NEPA to a particular federal action rests with the federal agency involved. *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1319 (8th Cir. 1974). The standard of review to be employed by a Court in evaluating an

agency's determination not to prepare an EIS has been articulated by the Eighth Circuit Court of Appeals as follows:

> We therefore hold that review of an agency's determination not to prepare an impact statement should be measured by its reasonableness in the circumstances.... *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974).

This Court will employ this standard in reviewing the agency's decision.

An analysis of the Secretary's duties in acting upon a mineral patent application is essential to a review of the agency's decision not to file an EIS. The description of the nondiscretionary function of the Secretary in acting upon an application for a mineral patent contained in 2 *The American Law of Mining* at § 9.04 (pages 284-285) illuminates the type of property interest which is conveyed to the recipient of a mineral patent under the applicable mining laws, *i.e.* 30 U.S.C. § 29 *et seq.* The pertinent portions of that section read as follows:

> It has been contended, unsuccessfully, that the granting of a mineral patent is a matter which is "by law committed to agency discretion." This view fails to recognize the fundamental distinction between the mining laws and the mineral leasing laws. Under the mineral leasing laws the Secretary may, in his discretion, refuse to issue any lease or prospecting permit at all on a given tract. *The locator of a mining claim, however, holds his claim by virture of an Act of Congress. Upon compliance with the requirements of the mining laws, he is entitled to a patent,*

and the Secretary has no discretion to deny an application for a mineral patent where all the requirements of law have been met. Thus, in the mining laws, Congress chose a method of disposing of public lands whereby the recipient of the grant had only to prove that he met the requirements of the law in order to have the *rights he obtained by location confirmed by patent.* The power confided by the Secretary with respect to the issuance of mineral patents is not that of granting or denying a privilege but of determining whether an existing privilege conferred by Congress has been lawfully exercised. The distinction between the power of the Secretary to issue a mineral patent and his power to issue a mineral lease or permit is the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion. Nevertheless, the Secretary is not authorized to issue a patent until he is satisfied that the requirements of the law have been complied with. . . .

A patent will not be issued unless, at the time of the patent application, the claim is valuable for minerals, and there exists, within the limits of the claim, a valid discovery. (Emphasis added.)

See also 2 *The American Law of Mining*, § 6.7. The case of *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 50 S.Ct. 103, 74 L.Ed. 445 (1930) is an early United States Supreme Court decision which involved the issuance of a writ of mandamus by the United States Supreme Court to the Secretary of the Interior ordering the Secretary to confer a mineral patent to a particular claimant after that claimant had successfully demonstrated compliance with the statutory prerequisites for a mineral patent. This case stands for

the proposition that the issuance of a mineral patent by the Secretary is a nondiscretionary action.

In determining that it was not necessary for the Government to prepare an EIS before issuing a patent to a mining claim in the case of *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 290-291 (1973), the Interior Board of Land Appeals made these observations:

> Upon satisfaction of the requirements of the statute, the holder of a valid mining claim has an absolute right to a patent from the United States conveying fee title to the land within the claim, and the actions taken by the Secretary of the Interior in processing an application for patent by such claimant are not discretionary; issuance of a patent can be compelled by court order. *Wilbur v. Krushnic, supra*, 280 U.S. at 318-19 [50 S.Ct. 103, 74 L.Ed 445]; *Roberts v. United States*, 176 U.S. 221, 231 [20 S.Ct. 376, 44 L.Ed. 443] (1900). The patent may contain no conditions not authorized by law *Deffeback v. Hawke*, 115 U.S. 392, 406 [6 S.Ct. 95, 29 L.Ed. 423] (1885). The claimant need not, however, apply for patent to preserve his property right in the claim, but may if he chooses continue to extract and freely dispose of the locatable minerals until the claim is exhausted, without ever having acquired full legal title to the land. *Union City Oil Co. v. Smith*, 249 U.S. 337, 348-49 [39 S.Ct. 308, 63 L.Ed. 635] (1919); *United States v. Carlile*, 67 I.D. 417, 421 (1960). The patent, if issued, conveys fee simple title to the land within the claim, but does nothing to enlarge or diminish the claimant's right to its locatable mineral resources.

The State urges this Court to reevaluate the charac-

terization of the Secretary's function in acting upon a mineral patent application as nondiscretionary. This Court finds that the existing and controlling case law clearly establishes that such actions are nondiscretionary. As the relevant mining law has not changed in any way which would allow this Court to distinguish or ignore the controlling law, this Court must accept the established precedent that the Secretary's actions in processing a mineral patent application are nondiscretionary. Consequently, the issue before this Court is whether the National Environmental Protection Act (hereinafter NEPA) applies to the performance of a nondiscretionary function and furthermore, whether the performance of this particular nondiscretionary function qualifies as a major federal action significantly affecting the environment to which the requirements of NEPA apply.

The relevant statute, 42 U.S.C. § 4332, provides, in pertinent part that:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> (C) include in every recommendation or report on proposals for legislation and *other major Federal actions significantly affecting the quality of the human environment*, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. (Emphasis added.)

The statutory language itself and the case law interpreting it reveals that the requirements of an environmental impact statement were developed to aid federal agencies in their *decision-making* processes. As the Court observed in *Calvert Cliffs' Coordinating Comm. v. A. E. C.*, 146 U.S.App. D.C. 33, 38, 449 F.2d 1109, 1114 (1971):

The apparent purpose of the "detailed statement" is to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action. Beyond the "detailed statement," Section 102(2)(D) requires all agencies specifically to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *This requirement*, like the "detailed statement" requirement, *seeks to ensure that each agency decision maker has before him and takes into proper account*

> *all possible approaches to a particular project* (including total abandonment of the project) *which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.* Moreover, by compelling a formal "detailed statement" and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own. (Emphasis added.)

Similar assumptions concerning the expectation that the environmental impact statements prepared by the particular federal agency will affect and influence that agency's decision-making process are found in other cases. For example, in commenting upon the requirements of NEPA in *Environmental Defense Fund v. Corps of Eng., U.S. Army*, 470 F.2d 289, 294 (8th Cir. 1972), the Eighth Circuit Court of Appeals observed:

> Thus the Act requires all administrative agencies of the federal government in the process of project development and decisionmaking to consider the environmental impact of their actions. 115 Cong.Rec. (Part 30) 40416 (1969).

See also *Iowa Citizens For Environmental Quality, Inc. v. Volpe*, 487 F.2d 849, 851 (8th Cir. 1973).

In evaluating a mineral patent application, the Secretary is hardly involved in a federal project or decision-making which can legally be influenced by the information which an EIS would disclose. The Secretary is merely acting upon a private party's assertion

of fee simple title to particular mineral claims. Furthermore, in the process of so acting, the Secretary is not permitted to consider environmental factors other than the costs of complying with environmental laws and regulations as such costs bear upon the question of the potential profitability of the mining project, and hence the inherent value of that claim. This Court finds that the nature of the property interest conveyed by our mining laws to a claimant which is confirmed by a patent and the Secretary's nondiscretionary actions in processing a mineral patent application are not compatible with requiring the preparation of an EIS before a mineral patent can issue.

The Eighth Circuit has adopted a unitary standard for evaluating whether a particular federal action is a major federal action significantly affecting the quality of the human environment. That court has stated:

> By bifurcating the statutory language, it would be possible to speak of a 'minor federal action significantly affecting the quality of the human environment,' and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA; the activities of federal agencies cannot be isolated from their impact upon the environment. *Minnesota Public Interest Research Group v. Butz, supra,* at 1321-22.

This unitary approach will therefore be followed.

NEPA has been held to apply to situations where the actions taken by the federal agency are relatively minor but form the basis for enabling the private par-

ties to act. As the Ninth Circuit Court of Appeals stated in *National Forest Preservation Group v. Butz*, 485 F.2d 408, 411-412 (9th Cir. 1973):

> While the federal defendants are not themselves planning to take action 'significantly affecting the quality of the human environment,' 42 U.S.C. § 4332(c), the private defendants plan such action, and the exchange is an act without which such action could not be taken. The land exchange is thus analogous to the licensing of or granting of federal funds to a nonfederal entity to enable it to act. Such federal 'enablement' has consistently been held to be subject to NEPA.

As the federal defendants involved are not planning to undertake any mining operation themselves, the issue is whether the Secretary's granting of a mineral patent application is the necessary step which enables the private parties to commence their mining operations and consequently a major federal action significantly affecting the quality of the human environment under the "enablement" analysis.

Unlike the cases where a federal license, permit, or lease is required before the private party can begin the particular project in question, the locator of a mining claim may begin his mining operation without a mineral patent. As the United States Supreme Court stated in *Union Oil Co. of California v. Smith*, 249 U.S. 337, 39 S.Ct. 308, 311, 63 L.Ed. 635 (1919):

> [A] discovery of mineral by a qualified locator upon unappropriated public land initiates rights much more substantial as against the United States and all the world. If he locates, marks, and records his claim

> in accordance with section 2324 and the pertinent local laws and regulations, he has, by the terms of section 2322, an exclusive right of possession to the extent of his claim as located, *with the right to extract the minerals*, even to exhaustion, without paying any royalty to the United States as owner, and *without ever applying for a patent* or seeking to obtain title to the fee. . . . (Emphasis added.)

(Also see additional sources cited earlier in this Memorandum Opinion.)

In the case of *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 436 F.Supp. 1194, 1200-1201 (U.S.D.C., D.Del.1977) the court held that an EIS need not be filed in conjunction with the project in question. We agree with the distinction drawn by that court:

> When federal agencies issue permits which are required to engage in activities with environmental consequences, such as operating a nuclear power facility, environmental impact statements frequently must be prepared before the permits can be granted. However, the typical permit case involves a private activity which cannot be carried on without federal permission. . . . No similar federal restriction prohibits the WMC from building and operating a new suburban hospital . . . even if it had ignored the § 1122 procedures available to it.
>
> Furthermore, in the typical permit case, the federal agency has discretionary powers to exercise. . . .

In the instant case, the receipt of a patent from the federal government is not a condition precedent to the

commencement of mining activities. Plaintiff argues strenuously that this Court should consider the difficulty which the private defendants will have in obtaining financing without a patent for their claims. This practical consideration is not controlling where the legal rights of the locator are clear. While the mineral patent would be of considerable value to the claimant, it is not a necessity for the claimant to have a mineral patent before beginning to extract minerals and, concomitantly, affect the quality of the human environment.

Under these circumstances, this Court cannot find that the initial agency decision not to prepare an environmental impact statement was unreasonable. In acting upon a mineral patent application, the agency is involved in a nondiscretionary activity of evaluating a property interest which does not permit the consideration of environmental factors. Any EIS would therefore be of minimal value. Furthermore, as a claimant can begin to extract minerals without a mineral patent, the granting of a mineral patent is not a major federal action significantly affecting the quality of the human environment.

This Court's decision upon the requirements of the law should not be construed as demonstrating an indifference to the environment. This Court is concerned about the environment and, particularly, about the future of the area for which the mineral patent is sought. The existing mineral patent laws need to be altered so that the legitimate environmental concerns of the people of the State of South Dakota and other interested persons are given a vital role in the mineral patenting process.

For the reasons set forth in this Memorandum Opinion, Defendants' motions to dismiss will be granted.

Appendix 4

UNITED STATES

v.

PITTSBURGH PACIFIC COMPANY

IBLA 74-271 Decided June 15, 1977

Appeal from so much of decision of Administrative Law Judge as dismissed contest brought by Montana State Office, Bureau of Land Management, against 12 lode claims located within the Black Hills National Forest under mineral patent application MONTANA 032330 (S.D.).

Set aside and remanded.

1. Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Patent—Rules of Practice: Appeals: Burden of Proof

   A mining claimant must prove a discovery under the prudent man test, including that the mineral can be extracted, removed and marketed at a profit.

2. Administrative Procedure: Substantial Evidence—Evidence: Sufficiency—Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Environment

   In a contest of a patent application for a lode min-

ing claim, the Board of Land Appeals may remand the case for further hearing to complete the record regarding the (1) availability and expense of necessary financing, land and water, (2) the expense of labor, and (3) the expense of compliance with environmental protection laws.

3. Environmental Policy Act—Mining Claims: Environment—National Environmental Policy Act of 1969: Environmental Statements

When parties are to offer evidence as to costs, to a mining claimant, of measures required by statute or regulation to mitigate environmental impact from development of a mine, it would be helpful for a Government contestant to assist an intervening state government and the claimant in computation of such costs; however, under 42 U.S.C. § 4332 (1970), an environmental impact statement is not required prior to the nondiscretionary federal action of issuance of a mineral patent.

APPEARANCES: John C. Banks and Jack E. Hanthorn, Esqs., U.S. Department of Agriculture, Denver, Colorado, for appellant, United States; Horace R. Jackson, Esq., Lynn, Jackson, Shultz, Ireland and Lebrun, Rapid City, South Dakota, for appellee, Pittsburgh Pacific Company; Attorney General William J. Janklow and Assistant Attorney General Lawrence W. Kyte, Pierre, South Dakota, for amicus curiae State of South Dakota; Richard W. Bliss, Esq., for amicus curiae American Mining Congress.

OPINION BY ADMINISTRATIVE JUDGE GOSS

The United States appeals from so much of a deci-

sion of Administrative Law Judge John R. Rampton, Jr., as dismissed a contest proceeding against a mineral patent application filed by appellee Pittsburgh Pacific Company for twelve 20-acre lode mining claims[1] located within the Black Hills National Forest, Lawrence County, South Dakota. The claims are contiguous and stretch in a north-south direction for somewhat over a mile. Upon request of the Forest Service, U.S. Department of Agriculture, the Bureau of Land Management filed a contest complaint against appellee's patent application, contending there had been no discovery of valuable mineral deposits and asking that the claims be held invalid. By order, the Board granted petitions of State of South Dakota[2] and American Mining Congress to file briefs as amici curiae.

The United States contends generally that Pittsburgh has not proved the discovery of valuable deposits, and supports its argument with allegations of error in the geological and economic analysis performed. Additionally, the State of South Dakota argues, *inter alia*, that adequate consideration has not been given to cost of compliance with environmental quality statutes and regulations.

Pittsburgh claims discovery of some 160 million tons of relatively low grade iron ore, including specular hematite and martite. Pittsburgh intends to mine 96

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[1] The claims involved on appeal are Pitt Pac Nos. 1 through 9 and Spec. Nos. 1 through 3. Two other lode claims, Spec. Fraction and Magnetite Fraction, were declared void by the Administrative Law Judge, and no appeal was taken as to those claims.

[2] Pittsburgh and South Dakota reply briefs were filed September 2, 1975.

million tons under a plan of operation which includes the annual removal of 7,200,000 long tons of ore; the crushing of the best 4,900,000 long tons; the cobbing (preliminary separation) of that ore; the reduction roasting of the best 2,300,000 long tons until all of the iron is magnetized and more readily ground and separated; grinding and magnetic separation, with gangue rock washed away; and the compression, into hard pellets, of 1,000,000 long tons of ore. The process of reduction roasting followed by fine grinding and magnetic separation of iron has not been used except on an experimental basis in a laboratory or pilot project. Each year 10,000 rail cars of such pellets, containing 62.68 percent natural iron, would be loaded and shipped. Pittsburgh *states that unless patents are issued, the necessary financing cannot be obtained.*[3] Assuming a 20-year payout on investment, and pellet prices as of February 1975,[4] the proposed operation would involve well over ½ billion dollars in gross revenue.

For reasons set forth hereafter, the decision of the Administrative Law Judge must be set aside and the case remanded. The decision, however, is well reasoned, and except as modified herein, the findings and conclusions are accepted.

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[3] The Board recognizes that many very sizeable mining ventures have been fully operated without patent.

[4] Pittsburgh alleges on appeal that the price of taconite pellets, at 62.68 percent natural iron, has increased at the lower lake ports from $15.795 per gross ton in October 1969 (when Pittsburgh prepared its cost/profit analysis) to $28.331 in February 1975, an increase of 79.4 percent. While the Board notes the rate of inflation, including the high increase in cost of energy, such new evidence is discussed *infra*.

[1] Pittsburgh is entitled to a patent for a particular claim if a "valuable mineral deposit" has been discovered on that claim. 30 U.S.C. §§ 22, 29 (1970). The test for determining whether or not deposits are "valuable" was set forth in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894):

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

This test has been cited with approval by the Supreme Court. *E.G.*, *Best* v. *Humboldt Placer Mining Company*, 371 U.S. 334, 335-36 (1963). To satisfy this prudent man test, Pittsburgh must show marketability under *United States* v. *Coleman*, 390 U.S. 599, 600 (1968), *i.e.*, that "the mineral can be extracted, removed, and marketed at a profit." *United States* v. *Kottinger*, 14 IBLA 10 (1973).

The Government concedes that Pittsburgh is acting in good faith in claiming the lands for the purpose of mining ore in paying quantities. The test, however, is objective rather than subjective. The United States grants title to mining claims in the national interest after finding there is a reasonable prospect that a successful mine will be developed.

[2] While Pittsburgh has submitted considerable evidence which indicates that a discovery has been obtained, there remain factors — some of which may be beyond the control of Pittsburgh — which could stand in the way of a profitable mining operation. After

evaluating the evidence, we conclude that substantial questions exist with respect to adequacy and cost of water supply, additional land, financing, labor costs, and expense of compliance with environmental protection laws.

Water Supply

No significant dispute exists over the amount of water needed for the mining and beneficiating process. It is agreed some 20,000 to 25,000 gallons per minute (gpm) of water will be used, with a recycle rate of approximately 95 percent, thus requiring 1,000 to 1,250 gpm of new water during operation. As possible sources, Pittsburgh has cited Box Elder Creek and nearby flooded abandoned mines, natural springs, and wells. It will be necessary for Pittsburgh to construct ponds of substantial acreage and depth for water storage, to supply water during relatively dry spells.

The United States argues that Pittsburgh has failed to prove that sufficient water would be available at the claims in South Dakota. Noting problems of obtaining ownership of water from private sources and permits for water from public sources, the Government characterizes Pittsburgh as "seem[ing] to have assumed that, with so much water around, it could secure enough for its use." Further, the Government argues that, even assuming *arguendo* the water is available, Pittsburgh has not adequately accounted for water-related costs involving acquisition of the water, additional land for storage and tailings reservoirs, construction of such reservoirs, possible pipeline easements, and pumping costs. *See United States* v. *Osborne (Supp. on Judicial Remand)*, 28 IBLA 13 (1976); *United States* v. *Kosanke Sand Corporation (On Reconsideration)*, 12 IBLA 282,

308-09, 80 I.D. 538, 551 (1973). In *Osborne* at 35, the Board indicated that a prudent man would be assured that an element essential to his mining operation was available, before he would make further expenditures:

> Since water is essential, and its lack makes aggregate production "very costly," it would seem that prudence would demand that the claimants satisfy themselves as to its availability in sufficient quantity before they "[w]ould be justified in the further expenditure of their labor and means, with a reasonable prospect of developing a paying mine." *Castle* v. *Womble*, 19 L.D. 455, 457 (1894); *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905); *Cameron* v. *United States*, 252 U.S. 450, 460 (1920); *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *United States* v. *Coleman*, 390 U.S. 599 (1968). Yet these claimants apparently are content to simply presume the availability of water on the claim in the desert to the approximate volume of 400 gallons per minute. No evidence was adduced to show how water would be obtained if none were found on the claim, or what effect this might have had on their ability to market aggregated at a profit prior to July 23, 1955.

Referring to cost figures presented at the hearing, Pittsburgh states that the "per ton production costing on plant construction would include (and does in most reported figures) cost of land and water." On the question of availability of water, Pittsburgh has submitted on appeal reports from professional ground water geologists who conclude that the company's stated need for 1,000 gpm, or 1,300 acre-feet of water per year, can be met entirely from the flow in Box Elder Creek, assuming that a 3-year water storage facility for approximately 4,000 acre-feet is constructed to insure that

water will be available. The reports do not deal explicitly with the question of how much of this flow would be available to Pittsburgh for appropriation,[5] nor are there estimates of costs of transportation of water from the stream to the plant. Such evidence may not be considered by the Board except to determine whether the hearing should be reopened. *United States* v. *McKenzie*, 20 IBLA 38, 44 (1975).

The evidence adduced at the hearing does not fully establish that sufficient water is reasonably available. Pittsburgh stated its volume of water requirement, noted several possible sources for that much water, and argued that there would thus be sufficient water. There was, however, no detailed showing that the rights could be acquired, nor was there any specification of cost of such supply, beyond the general statement of construction costs. On remand, the parties will have the opportunity to show more clearly whether the requisite water supply can be obtained and delivered at feasible cost.

Additional Land

Pittsburgh will require approximately 600 to 900 acres of land outside the mining claims upon which to construct its plants, tailings pond, and water storage reservoir (Tr. 899). A small portion of this land may be available to appellants as millsites. 43 CFR Subpart 3864. The Government alleges that Pittsburgh has not shown it will be able to obtain the necessary land. Pittsburgh contends that there "is substantial land in

[5] In its response brief to the amicus brief of the State of South Dakota, the United States suggests that a permit must be obtained from the South Dakota Water Resources Commission.

private ownership adjacent to and in the near vicinity of the involved claims * * * [which] can be acquired in the normal course of business when the time comes." Additionally, Pittsburgh notes that it is possible to purchase lands in other areas and exchange them with the Forest Service for adjacent land within Black Hills National Forest.

Pittsburgh presented oral evidence that sufficient lands in private ownership exist near the claims. The Board takes official notice of the more current status plats[6] for the areas surrounding the mining claims. 43 CFR 4.24b. After studying these plats, a question remains as to whether Pittsburgh will be able to obtain the required acreage of appropriate location without obtaining national forest lands. While there may be private tracts which are geographically and economically feasible, this is not clear from the record.

Apparently, the only other feasible land is in the National Forest, managed by the Forest Service. Since this contest was initiated at the request of the Forest Service, it is not clear whether the Service would be amenable to the necessary exchange.

A reasonably prudent man would take steps to assure that essential land is available to the project. *See Osborne, supra.* On remand, Pittsburgh will have an opportunity to show that it can acquire the requisite suitable acreage for the anticipated construction, in a

[6] The plats are: (1) MT Plat, T. 3 N., R. 5 E.; (2) MTP Suppl. Sec. 18, 21, 22, T. 3 N., R. 5 E.; (3) MT Plat, T. 3 N., R. 4 E., Black Hills Meridian, Lawrence County, South Dakota. The maps were current as of June 16, 1976, and were supplied by the Montana State Office, Bureau of Land Management.

feasible configuration and at a price harmonious with a profitable mining operation.

Financing

Pittsburgh estimated that as of October 1969, some $28,000,000 would be required to finance the project. The Government argues that Pittsburgh had shown no source of financing. Pittsburgh states that "normally financing is done or at least underwritten by the users of the product, the steel mills and companies desiring to insure a source of supply."[7] At the hearing, John D. Boentje, Pittsburgh's President, testified that:

> [O]f the pellet projects that have been initiated in this country there is probably only one that does not have a steel company as a sole owner or a partnership of an iron ore company and a steel company or a partnership of several steel companies possibly with an iron ore company.[8]

He also averred that he would not, on the basis of the projections made for this operation, hesitate to approach the steel companies to invite their financial participation.[9]

Fred DeVaney, an expert witness brought in by the Company, noted that "[m]uch of the money that has gone into these taconite plants has come from insurance companies, and much has come from the steel companies that need the pellets."[10] DeVaney also gave

[7] Brief for contestee, January 17, 1973 at 92-93.

[8] Tr. 439.

[9] Tr. 440.

[10] Tr. 709-10.

a step-by-step account of the process typically undertaken by an iron ore mining company in securing financing for a project from the various steel companies,[11] but he explained further that:

> One of the first things they ask you is do you have title to your land or do you have options on it. And I mean, *if you don't have an option or title to it, they are not very much interested in putting any money in it until they know where you are at.* [Emphasis added.] So that is why you carry things so far until we get financing on it.[12]

The Department, of course, is most anxious that it not patent the land only to have the project fail for lack of financing. The upwards of $28,000,000 in financing is as essential to appellant's project as is the required water and land. If it could be shown by further evidence that a responsible financial source would probably furnish the funds needed, conditioned upon patents being issued by the United States, this would help to assuage Departmental questions as to the likelihood of full development of the deposit. The Board does not believe a prudent miner would continue making his own substantial investments until he has a reasonable expectation of success in developing a valuable mine and of the availability of additional funds, if necessary, at feasible interest cost. *See Osborne, supra.*[13] On remand, the parties will have the opportunity to present evidence as to potential avail-

[11] Tr. 709-13.

[12] Tr. 711.

[13] The Board does not mean to indicate that for mining claims involving operations of substantially lesser scope, similar evidence of financing would ordinarily be necessary.

ability of financing and other matters as discussed herein.

Labor Costs

To determine the estimated cost of labor, the parties have introduced the cost experience of Pittsburgh and comparable companies.

Pittsburgh's case *re* labor costs was made out by Pavel Zima, an engineer with the company, primarily by means of the economics section of the Mineral Evaluation Report, Exhibit M-4.[14] This report shows operation-by-operation estimates of labor needs and costs, and labor expense is allocated to each processing step. Zima's labor estimates at each step are merely stated, however, and are not explained, describing the operation involved and detailing why the given number of men at a given wage cost is needed.

Government witness Dr. Alfred Petrick stated as his opinion that 252 persons, rather than 177, as estimated by Zima, would be necessary for the total operation, and that the increase in costs occasioned by the 75 extra persons would then be approximately $948,000 annually.[15] A major factor in Petrick's analysis of Pittsburgh's total labor needs was a comparison of labor use experience in several other plants. At page 997 of the hearing transcript, he stated:

> Of course, we are dealing with different outputs and have to make some allowances, but looking at seven or eight or nine plants' totals, and looking at

[14] See also the hearing transcript at 771-72, 777-79, 808.

[15] See the hearing transcript at 934, 946-49, 995-1000.

> the maintenance force as a percentage of the total, I don't feel that I would be out of line adding this number of men to the maintenance crew at this operation and the total is in the same area so far as total employment of these other plants.

Petrick did not specify the individual operations to which he believed the members of the increased labor force would be allocated. Neither did he give a detailed breakdown of the comparison process he employed in analyzing the relevance of the labor experience of the seven to nine other plants. Though Pittsburgh did cross-examine Petrick on his labor estimates, it made no attempt to offer additional evidence on this question.

The following evidence provides an additional basis for comparison with Pittsburgh's anticipated labor costs: a 1962 news summary (Exhibit M-48) noting that the Kirkland Lake plant in Canada would produce 1 million tons per year (tpy) of 66 percent iron pellets from ore of an undisclosed concentration by employing 400 persons; a 1963 brochure (Exhibit M-37) describing the Groveland Mine in Michigan, where 180 employees produced 1.25 million tpy of similar pellets out of ore averaging 33 percent iron, and where ore of concentration less than 25 percent was not processed; a 1964 memo (Exhibit M-39) from Pittsburgh's President *re* Eveleth Taconite Company's plans for a mine employing 350 to 375 persons to produce 1.63 million tpy of similar pellets from ore of undisclosed concentration; a 1969 brochure (Exhibit M-36) and a 1970 article[16] on the Jackson County Iron Company in Wisconsin, stating that 750,000 tpy of similar pellets were produced from

[16] Attached to Pittsburgh's response to the amicus brief of the American Mining Congress.

ore of a 22 to 23 percent iron content through the efforts of 230 workers and managers; an article (Exhibit M-44) projecting that a plant could use a reduction roasting process to produce at a profit 1.2 million tpy of 64 percent pellets from 40 percent ore at a labor cost of $900,000 per year; and a 2-page study attached to Exhibit M-44 forecasting labor costs of $1,127,848 per year for a reduction roasting plant producing 2 million tpy of 64 percent pellets from 45 percent ore. Only the latter two projected operations involve reduction roasting.

Questions remain regarding Pittsburgh's estimate that it will be able to produce 1 million tpy of 63 percent pellets out of ore averaging 17 percent iron content, with a processing cut-off at 12 percent concentration, while employing only 177 persons. At the Groveland Mine, noted above, 25 percent greater production than Pittsburgh contemplates is achieved with approximately the same number of employees, but the ore bears slightly more than twice as much iron, and no reduction roasting process is necessary. Because of the lower iron concentration in its ore, Pittsburgh may have greater labor expenses involved in drilling, blasting, mining, and transporting the larger volumes of ore, putting it through at least the primary stages of beneficiation, and disposing of waste material. In the Jackson County Iron Company example, we see 25 percent less output than Pittsburgh intends, but at a 30 percent higher employment level. Assuming *arguendo* that the ore concentration is as low for the Kirkland Lake and Eveleth Taconite projects as it would be for Pittsburgh's, we note that Kirkland Lake uses 400 persons to produce the same tonnage per year as Pittsburgh forecasts, and that Eveleth was expecting an

output only 63 percent higher than Pittsburgh's but at a utilization of 100 percent more employees.

While the evidence discussed above would on its face indicate that Pittsburgh's labor expense estimates are too low, we do not feel that there is sufficient evidence in the record for us to determine the matter. Petrick only barely detailed in his testimony the evidence upon which he based his opinion that the labor cost projection must be raised. We recognize that there can be differences in mining and engineering factors between various mines and plants producing the same iron pellets, and that these differences can have a substantial influence on labor costs, *e.g.*, the relative softness of the South Dakota ore compared with the ore of the Mesabi Range mines, or the possibility of higher percentage recovery of iron because of reduction roasting. Additional evidence is necessary to assess the accuracy of Pittsburgh's labor expense projections.

Cost of Compliance with Environmental Quality Statutes and Regulations

At the hearing, environmental costs were considered only to a limited degree. In Pittsburgh's testimony and in the economics section of Pittsburgh's Exhibit M-4, it was succinctly given that environmental protection costs were comprehended by the anticipated general construction costs listed in the report, plus 1 cent for miscellaneous environmental control for each ton shipped. Construction was to be undertaken as a matter of course in a manner which would assure environmental quality maintenance.

Neither did the government establish the environ-

mental protection measures which would be required and the cost thereof. However, it is noted that considerable environmental legislation and regulations have been promulgated since the evidence herein was first formulated.

As amicus curiae, South Dakota has posed questions concerning water quality, air pollution, reclamation and other problems. The cost of compliance with governmental and other environmental requirements are of course significant in determining whether there has been a discovery. *Kosanke, supra* at 12 IBLA 298-99, 80 I.D. 546-47.

As stated, there would be a removal of some 7.2 million tons of material per year, ultimately affecting an area of about 240 acres now within a national forest. In addition, Pittsburgh would need to construct ponds and buildings over some 600 to 900 acres on other lands in the area. Some 4.9 million tons will annually move into the beneficiation process, and this may create the need for environmental controls as to dust and disposal of waste water and soil. All told, some 6.2 million tons of waste earth will have to be disposed of. Though Pittsburgh had proposed to use natural gas, the roasting of 2.3 million tons per year could create air pollution problems. A railroad spur will have to be constructed, presumably through the National Forest. Adjacent to the claims are two creeks which South Dakota states it has classified as cold water fisheries.

The State is therefore admitted as a party to the contest, in order that the State, together with the other parties, may offer new evidence[17] as to environ-

[17] See *infra*.

mental requirements, the cost of compliance, and other pertinent factors.

Environmental Impact Statement

[3] The State of South Dakota submits that an Environmental Impact Statement (EIS), 42 U.S.C. § 4332 (Supp. V, 1975), would serve a useful purpose in the Department's deliberations. The principal State arguments may be summarized:

1. The action of issuance of patents is a major federal action significantly affecting the human environment under § 4332 in part because Pittsburgh admits the essential financing of the project cannot be obtained unless the patents are issued.

2. Preparation of a federal impact statement is not "impossible" under § 4332, regardless of whether a patent is required to issue. Rather, the Act requires compliance to the fullest extent possible.

3. One of [the EIS] purposes is to require the giving of attention to an environmental problem regardless of whether the agency has authority to do anything about it. *The Scenic Rivers Association of Oklahoma* v. *Lynn*, 520 F.2d 240, 245 (10th Cir. 1975), *rev'd on other grounds, sub nom. Flint Ridge Development Company* v. *Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976).

4. The EIS would be helpful in providing information to the Secretary of the Interior for utilization in submitting his report for Congress under 30 U.S.C. § 21a (1970), to other executive offices, to the Congress itself, to the State and to others generally.

[See *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972).]

5. The National Environmental Policy Act (NEPA) requires the Federal Government to make available its expertise to assist the States in discharging their responsibility to determine potential adverse impacts and to take necessary steps to mitigate. 42 U.S.C. § 4332(2)(G) (Supp. V, 1975).

6. The Administrative Law Judge must consider the costs of compliance with state and federal environmental statutes and regulations. *United States* v. *Kosanke Sand Corporation (On Reconsideration)*, *supra*. An EIS would permit environmentally informed decision making, by indicating comprehensively and in detail whatever adverse environmental impacts must be mitigated. It would provide a basis for the parties to argue the costs thereof. Under *Kosanke*, in fulfilling the requirements of § 4332 "to the fullest extent possible," the Department should at the least prepare a statement within the scope of these environmental costs.

7. NEPA mandates that any EIS will be prepared at the earliest possible moment in order to be of maximum assistance to all. *See Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972); *Harlem Valley Transportation Association* v. *Stafford*, 360 F. Supp. 1057 (S.D. N.Y. 1973).

Whether there is a requirement for an environmental impact statement depends upon whether, within the intent of the statute, the nondiscretionary act of issuance of a mining claim patent is a major federal ac-

tion significantly affecting the human environment. An EIS would encompass much more than computation of the direct environmental costs which are required to be borne by Pittsburgh. While evidence as to such costs may be offered in connection with the hearing on remand, such evidence could be developed without the preparation of an EIS. *Kosanke, supra.*

Although Pittsburgh located its claim and performed exploration work before NEPA was enacted, no mining has commenced. It could be argued there has not been an irreversible and irretrievable physical commitment of resources. 42 U.S.C. § 4332, part (2)(C)(v) (Supp. V, 1975); *Arlington Coalition on Transportation* v. *Volpe*, 458 F.2d 1323, 1331, 1333, 1335, 1337 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972). If Pittsburgh were to commence its mining before patenting, the Forest Service would probably prepare a statement before approving a mining plan of such magnitude within the National Forest. 36 CFR Part 252; *Friends of the Earth, Inc.* v. *Butz*, 406 F. Supp. 742, 747-48, (D. Mont. 1975), *appeal docketed*, 9th Cir., No. 75-3477 (Oct. 24, 1975). Forest service regulation 36 CFR 252.4(f) provides:

> Upon completion of an environmental analysis in connection with each proposed operating plan, the authorized officer will determine whether an environmental statement is required. Not every plan of operations, supplemental plan or modification will involve the preparation of an environmental statement. Environmental impacts will vary substantially depending on whether the nature of operations is prospecting, exploration, development, or processing, and on the scope of operations (such as size of operations, con[s]truction required, length of

> operations and equipment required), resulting in varying degrees of disturbance to vegetative resources, soil, water, air, or wildlife. *The Forest Service will prepare any environmental statements that may be required.* [Emphasis added.]

As to whether an impact statement is required before prospecting in a national forest, the District Court in *Friends of the Earth* ruled:

> The defendants argue that an EIS is not yet required, since the Forest Service's approval merely went to defendant [Johns Manville Sales Corporation's] plan of proposed prospecting operations. Defendants point to the 1872 mining law (30 U.S.C. §§ 22 *et seq.*), and the Organic Act of June 4, 1897 (16 U.S.C. § 748), for the proposition that defendant JMSC has a statutory right to go upon national forest lands for the purposes of mineral exploration, development and production. Regardless of what right JMSC may have, the defendants still must comply with NEPA.
>
> * * * * * *
>
> JMSC's operations realistically involve only a small project which will not significantly affect the quality of human environment. But, as JMSC indicates and as the Court completely agrees, if JMSC later desires to proceed with the mining operation, an environmental impact statement will be required before any mining activity commences.

South Dakota also cites *Gifford-Hill* v. *F.T.C.*, 389 F. Supp. 167 (D. D.C. 1974), for the proposition that an EIS is required with respect to significant actions

taken by private persons where federal permission[18] is required.

In the event that Pittsburgh should apply to the Forest Service for a discretionary exchange of lands in order to gain additional acreage, as discussed *supra*, presumably an EIS would be required. *National Forest Preservation Group* v. *Butz*, 485 F.2d 408, 411-12 (9th Cir. 1973).

If it can be proved that Pittsburgh has made a discovery on a particular claim, then, all else being regular, Interior would have no discretion as to whether patent should issue. *Cameron* v. *United States*, 252 U.S. 450 (1920); *United States* v. *O'Leary*, 63 I.D. 341 (1956). In 1973 *United States* v. *Kosanke Sand Corporation*, *supra*, set out the Departmental position that EIS statements are not generally required in connection with such nondiscretionary patenting of mining claims. The statute pertaining to impact statements was amended in 1975, without pertinent change. 42 U.S.C. § 4332 (Supp. V, 1975).

The Tenth Circuit in its 1975 decision, *Scenic Rivers Association of Oklahoma*, *supra*, upheld a 1974 District Court decision that an impact statement was necessary in an interstate commerce matter, despite the fact that a nondiscretionary federal action and private rights were involved. In 1976, on certiorari *sub nom. Flint Ridge*, *supra*, the Solicitor General argued forcefully that no statement was required in connection with a nondiscretionary action:

[18] The examples cited by the Court all involve discretionary Federal actions.

Indeed, because compliance with the Disclosure Act is prerequisite only to the sale or lease of lots in interstate commerce (15 U.S.C. 1703(a)(1)), and not to the funding of developments, actions significantly affecting the environment can occur well before the developer is required to file his statement of record and property report.

We submit that, in light of the foregoing, NEPA is inapplicable to the effectiveness of developers' filings with OILSR under the Disclosure Act. As Senator Jackson, the principal sponsor of NEPA, stated on the Senate floor, NEPA's procedural requirements simply direct "al agencies to assure consideration of the environmental impact of their actions in decisionmaking" (115 Cong. Rec. 40416 (1969)). Thus, Section 102(2)(A) of NEPA requires federal agencies to utilize a systematic interdisciplinary approach insuring integrated use of relevant science and design arts "*in planning* and *in decisionmaking* which may have an impact on man's environment" (emphasis added). Section 102(2)(B) directs such agencies to develop methods and procedures to ensure that environmental values "may be given appropriate consideration *in decisionmaking* along with economic and technical *considerations*" (emphasis added). And Section 102(2)(C) requires federal agencies to include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."

Each of these requirements in Section 102 is aimed at federal agencies that have planning responsibilities or decisionmaking powers—agencies that

can take account of the environmental consequences of their proposed actions and be guided accordingly.

Brief for Petitioner at 16-17, *Flint Ridge, supra.*

The Supreme Court reversed on other grounds and did not resolve the issue herein concerned. The Court stated at 426 U.S. 786:

> First, [petitioners] claim, allowing a disclosure statement to become effective is not major federal action significantly affecting the quality of human environment within the meaning of NEPA. In petitioners' view, NEPA is concerned only with introducing environmental considerations into the decision making processes of agencies that have the ability to react to environmental consequences when taking action. If the agency cannot so act, its action is not "major" and does not fall within the statutory language. Thus, petitioners urge, NEPA should not be read to impose a duty on HUD to prepare an environmental impact statement in this case since the agency, by statute, has no power to take environmental consequences into account in deciding whether to allow a disclosure statement to become effective. To this respondents counter, as did the Court of Appeals, that NEPA's goals are not so narrow and that even if the agency taking action is itself powerless to protect the environment, preparation and ciruclation of an impact statement serves the valuable function of bringing the environmental consequences of federal actions to the attention of those who are empowered to do something about them—other federal agencies, Congress, state agencies, or even private parties.

Petitioner's second argument is that even if HUD's action in allowing a disclosure statement to become effective constitutes major federal action significantly affecting the quality of the human environment within the meaning of NEPA, HUD is nonetheless exempt from the duty of preparing an environmental impact statement because compliance with that duty is not possible if HUD is also to comply with the Disclosure Act's requirement that statements of record become effective within 30 days of filing, unless incomplete or inaccurate on their face. In response to this claim, respondents contend that the Secretary has an inherent power to suspend the effective date of a statement of record past the 30-day deadline in order to prepare an impact statement. Because we reject this argument of respondents and find that preparation of an impact statement is inconsistent with the Secretary's mandatory duties under the Disclosure Act, we need not resolve petitioners' first contention.[19]

[19] In *Flint Ridge*, the Court further stated at 426 U.S. 787: "NEPA's instruction that all federal agencies comply with the impact statement requirement—and with all the other requirements of § 102—'to the fullest extent possible,' 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. This conclusion emerges clearly from the statement of the Senate and House conferees, who wrote the 'fullest extent possible' language into NEPA:

'The purpose of the new language is to make it clear that each agency of the Federal Government *shall* comply with the directives set out in [§ 102(2)] *unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible * * *. Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directive set out

The Supreme Court has thus left undetermined whether a NEPA statement is required to be prepared by Government agencies in connection with nondiscretionary actions. If the Justice Department analysis of the statute, as quoted *supra*, were to be changed, it would have a far reaching effect throughout the Federal Government. With respect to the nondiscretionary issuance of patents, therefore, the Department is constrained to follow the Justice interpretation,[20] which interpretation is in accord with *United States* v. *Kosanke Sand Corporation*, *supra*.

Further, because the Forest Service has management responsibility for the national forest lands herein concerned, it would appear that the Forest Service would be the appropriate agency to prepare any statement.[21] No authority has been cited under which the

in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.' 115 Cong. Rec. 39703 (1969) (House conferees) (emphasis added).
See *id.*, at 40418 (Senate conferees). See also 40 CFR 1500.4(a) (1975).

"Section 102 recognizes, however, that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As we noted in *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973), 'NEPA was not intended to repeal by implication any other statute.' And so the question we must resolve is whether, assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict with her duties under the Disclosure Act."

[20] *See Harrison* v. *Vose*, 18 U.S. (9 How.) 181 (1850).

[21] 36 CFR 252.4(f); 40 CFR 1500.7(b). For an oil and gas lease in a national forest, where the Government retains ownership of the property and Interior supervises the lease, the Board has ruled that Interior is the lead agency for preparation of the statement. *W. T. Stalls*, 18 IBLA 34, 35-36 (1974).

Department could order a full EIS to be prepared by the Forest Service, where the statement is not required by law.

The Board recognizes, however, that a project which would take 240 to 1,140 acres from a national forest, mine over 7 million long tons of ore annually, and each year ship 10,000 railroad cars of finished pellets, is not a typical group of mining claims. The State has requested assistance in computation of the cost to Pittsburgh of measures to be required to alleviate the environmental impact of the project. It would be helpful for the Forest Service, as contestant, to assist the State and appellant in the computation of the evidence of environmental costs at issue in the contest.[22]

New Evidence

Any formal request to consider new evidence as to ore values, energy availability and costs, environmental matters, or other items of expense should be presented to the Administrative Law Judge for his ruling, prior to the rehearing, in connection with the stipulation at Tr. 865 and the problems discussed in *United States* v. *Estate of Alvis F. Denison*, 76 I.D. 233, 251-54 (1969).

On remand,[23] the Administrative Law Judge will have discretion to entertain any other issues which he

[22] See 42 U.S.C. § 4332, part (2) and (G) (Supp. V, 1975); Forest Service and Bureau of Land Management Memorandum of Understanding, part A, 11 (April 1, 1957); 43 CFR 4.452-4 and 4.452-5. *Cf.* 36 CFR 252.4(f), *supra*.

[23] Other points of law and fact have been argued on appeal, but because of the decision to remand, such matters need not be discussed at this time.

deems proper, in order to formulate the required findings and conclusions.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the matter is remanded.

Joseph W. Goss
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Martin Ritvo
Administrative Judge